12-10-2013

Hap Taylor & Sons v. Summerwind Partners Respondent's Brief 1 Dckt. 40514

IN THE SUPREME COURT OF THE STATE OF IDAHO

HAP TAYLOR & SONS, Inc., d/b/a KNIFE RIVER, an Oregon corporation,

Plaintiff-Cross-Respondent,

v.

L222-1 ID SUMMERWIND, LLC a Nevada limited liability corporation,

Defendant-Cross Appellant,

and

IDAHO GOLF PARTNERS, INC.,

Intervenor-Respondent-Cross Appellant

CONGER MANAGEMENT GROUP, INC., an Idaho corporation,

Plaintiff-Counterdefendant-Cross Defendant-Respondent,

v.

STANLEY CONSULTANTS, INC.,

Defendant-Counterclaimant-Cross Claimant-Appellant,

and

INTEGRATED FINANCIAL ASSOCIATES, INC., a Nevada corporation,

Defendant-Counterdefendant-Cross Defendant-Respondent-Cross Appellant,

and

GENEVA EQUITIES, LLC, an Idaho limited liability company; TRADITIONAL SPRINKLERS AND LANDSCAPING, INC., an Idaho corporation; DENNIS PHIPPS WELL DRILLING, INC., an Idaho corporation; RIVERSIDE, INC., an Idaho corporation,

Supreme Court No. 40514-2012
District Court Nos. 2008-4251/2008-4252/2008-11321

Defendants-Counterdefendants-Cross
Defendants-Respondents

and

IDAHO GOLF PARTNERS, INC.,

Intervenor-Respondent-Cross Appellant.

RESPONDENT'S BRIEF

APPEAL FROM THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT.

HONORABLE JUNEAL C. KERRICK, DISTRICT JUDGE PRESIDING.

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I. STATEMENT OF THE CASE

A. Nature of the Case.

This appeal presents the very narrow question of whether a mechanic's lien for professional services has priority from the date professional services were commenced or the date the professional services were commenced to be furnished. Because Idaho Code § 45-506 provides that the priority date begins to run when "professional services were commenced to be furnished" this Court should affirm the district court's order, which holds that something more than 1.5 hours of off-site, pre-construction "project administration" is required to establish the priority date for a professional services lien.

B. Course of Proceedings Below.

The district court denied appellant Stanley Consultant, Inc.'s ("Stanley") motion for summary judgment regarding priority on the grounds that there was no evidence in the record that Stanley furnished any professional services on-site prior to the date the construction lender, Integrated Financial Associates, Inc. ("IFA"), recorded its deed of trust. Because it was undisputed that Stanley did not furnish any on-site work prior to the date IFA recorded its deed of trust, the parties stipulated to the entry of an interlocutory judgment so that this Court could resolve that single legal issue.

C. Concise Statement of the Facts.

On June 26, 2007, Stanley employee Steven Arnold recorded 1.5 hours of time for a project described as the "Summerwind Club House" under the task number for "project administration." R. Vol. 5, p. 698. Beyond this description, there is no evidence in the record regarding what was involved in that 1.5 hours of "project administration."

On July 13, 2007, IFA recorded the deed of trust encumbering the subject property. R. Vol. 4, p. 1519.

On July 19, 2007, Stanley employee, Rick Sharp, recorded four hours of time on the Summerwind Club House project under the task number for "labor." R. Vol. 5, p. 717; *see also* R. Vol 5, p. 699 and 716 (same time entry appears to have been recorded and reversed). It is undisputed that this is the first date Stanley performed any work on-site. App. Br. at 8.

There is no record of Stanley doing any work related to Summerwind project—whether off-site or on-site—between June 26, 2007 and July 19, 2007.

II. RESTATEMENT OF ISSUES PRESENTED ON APPEAL

Whether, under Idaho's mechanics lien law, 1.5 hours of off-site, pre-construction, project administration gives rise to a priority date for a professional services claim of lien.

III. ARGUMENT

A. The phrase "commenced to be furnished," as used in Idaho Code Sections 45-506, requires something more than just beginning professional services.

Because the phrase "commenced to be furnished" necessarily means something more than "commenced," the district court's order should be affirmed. Idaho Code § 45-506 sets forth how priority dates for mechanics liens are established. It provides:

> The liens provided for in this chapter shall be on equal footing with those liens within the same class of liens, without reference to the date of the filing of the lien claim or claims and are preferred to any lien, mortgage or other encumbrance which may have attached subsequent to the time when the building, improvement or structure was commenced, work done, equipment, materials or fixtures were rented or leased, or **materials or professional services were commenced to be furnished**; also to any lien, mortgage, or other encumbrance of which the lienholder had no notice, and which was unrecorded at the time the building, improvement or structure was commenced, work done, equipment, materials or fixtures were rented or leased, or **materials or professional services were commenced to be furnished**.

IDAHO CODE § 45-506 (emphasis added). As demonstrated below, the use of the word "furnish" contemplates some type of delivery requirement above and beyond merely engaging in professional services. Because this interpretation is consistent with Idaho law, this Court should hold that the mere commencement of professional services is insufficient, as a matter of law, to establish the priority date of a professional services lien. The district court's decision should be affirmed because it is consistent with Idaho's mechanic's lien laws to hold that 1.5 hours of off-site, pre-construction "project administration" is insufficient to establish the priority date of a professional services lien.

1. Idaho Code § 45-501 creates a distinction between preparing, rendering, and furnishing professional services.

Stanley takes the position that the priority date for liens for professional services should be treated differently than the priority date for liens for material suppliers because section 45-501 gives professionals the right to a lien as soon as they begin preparatory work. App. Br. 42 ("Common sense dictates that the priority date for a materialman arises in tandem with the lien right, and for professional engineers, such date is when the planning, designing, or any authorized services are commenced under Idaho Code Sections 45-501 and 45-506."). Stanley's argument, however, rests upon a flawed premise: contrary to Stanley's position, section 45-501 does not give professionals a right to lien as soon as they begin preparatory work. Rather, by the plain language of the statute, lien rights do not arise unless the professional services are "furnished."

In pertinent part, section 45-501 reads:

> ...and every professional engineer or licensed surveyor under contract who **prepares** or **furnishes** designs, plans, plats ... or who **renders** any other professional service whatsoever for which he is legally authorized to perform in connection with any land or building development or improvement, or to establish boundaries,

> has a lien upon the same for the work or labor done or **professional services** or materials **furnished**, ...

(emphasis added). The use of the words "prepares," "furnishes," and "renders" when discussing activities that give rise to lien rights stands in contrast to the use of only the word "furnished" when establishing the actual lien. Because there is a difference between these words, "furnished" must mean something other than prepare or render.

2. The word "furnished" and the phrase "commenced to be furnished" contemplate the act of delivering, giving over, or providing; not just merely preparing or doing.

The careful use of the words "prepares," "furnishes," and "renders" means that the words are to have different meanings and, indeed, pursuant to their ordinary usage, they do have different meanings. The word "prepare" is defined as follows: "1: to make or get ready <~ dinner> <~ a student for college> 2: to get ready beforehand 3 : to put together : compound <~a prescription>." The Merriam-Webster Dictionary, Home and Office Edition, 411 (1995). The word "prepare" therefore, connotes the idea of getting ready or assembling. The word "renders" is defined as follows:

> 1: "to extract (as lard) by heating 2: to give to another; also : yield 3: to give in return 4: **to do (a service) for another <~aid>** 5: to cause to be or become : make 6: to reproduce or represent by artistic or verbal means 7: translate <~ into English>.

The Merriam-Webster Dictionary, Home and Office Edition, 444 (1995) (emphasis added). The word "renders" connotes the idea of doing or creating. Conversely, the word "furnish" connotes something more than merely getting ready, doing, or creating; it connotes giving or handing over: "1: to provide with what is needed : equip 2 : supply, give." The Merriam-Webster Dictionary, Home and Office Edition, 213 (1995). Because the words "prepare" and "render" connote getting ready, making, or doing and the word "furnish" connotes providing, giving, or supplying, section 45-501's use of the word "furnished" indicates that something more than

merely doing or preparing professional services must be accomplished before lien rights attach: i.e., the professional services must be furnished.[1]

When Idaho Code § 45-501 is read with the plain meaning of these words in mind, it is clear that lien rights arise only when the objects of the professional services are furnished. Because lien rights arise only when the objects of the professional services are furnished, it logically follows that the priority set forth in section 45-506 is the date "professional services were commenced to be furnished."

3. The Idaho Court of Appeals has previously interpreted the phrase "commenced to be furnished" to mean "first delivered on site."

The word "furnishes" should have the same meaning in both sections 45-501 and 45-506 and it should have the same meaning when applied to those providing professional services as it does when applied to those providing materials. Statutory construction requires that the same word be given consistent meanings and consistent applications, unless a contrary intent is obvious. *See, e.g., Sprouse v. Magee*, 46 Idaho 622, 630-31, 269 P. 993, 995-96 (1928). In *Beall Pipe & Tank Corp. v. Tumac Intermountain, Inc.*, the Court of Appeals interpreted the phrase "commenced to be furnished," when used in reference to materialmen, to mean the date when materials were first delivered on-site. 108 Idaho 487, 492, 700 P.2d 109, 114 (Ct. App. 1985) (citing *Walker v. Lyton Sav. & Loan Ass'n of N. Cal.*, 2 Cal. 3d 152, 84 Cal. Rpt. 521, 524, 465 P.2d 497, 500 (1970)). The *Beall Pipe* Court expressly noted that "commenced to be furnished" did not refer to the first date that a materialman began preparing materials for delivery to the site. *Id.*

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[1] This interpretation is consistent with Judge Owens' indication on Page 2 of the *Memorandum Decision and Order Re: Credit Suisse AG, Cayman Islands Branch's Motion to Reconsider* that an architect only has lien rights if his plans are actually incorporated into a building. The actual incorporation of architectural plans into improvements upon or to the land would satisfy the requirement that the professional services be "furnished."

Stanley, relying in large part on Judge Owens' opinions in the *Tamarack* cases, argues that professionals should be treated differently because professionals do a significant amount of preparatory work off-site. Not only is this distinction not recognized by the statute, it is a disingenuous distinction at best. Materialmen can and do spend time and energy off-site, preparing their product for delivery to the site. This is especially true if a materialman fabricates materials off-site for delivery to the site where the material can then be incorporated into the improvement.

Moreover, Stanley's false distinction is not instructive as to how the statute should be applied because it does not track the purpose and intent of the statute. The intent of the statute is to compensate those who, by their work or materials, have contributed to improving the land. "That right of lien is based on the theory that the claimant has, either by his labor or by the materials furnished and used, contributed to the construction or improvement of the property against which the lien is asserted." *Chief Industries, Inc. v. Schwendiman*, 99 Idaho 682, 688, 587 P.2d 823, 828 (1978). Stanley's distinction does not reflect the intent to compensate those whose services contribute to the improvement of property; rather, Stanley's distinction seeks to compensate professionals regardless of whether their services contribute to the construction or improvement of the property.

Just as materials sitting in a warehouse do not contribute to the improvement of the land, an engineer's plans, sitting on his desk, do not contribute to the improvement of the land. Accordingly, just as a materialman must furnish his materials by delivering them, an engineer must also furnish either his professional services or the objects of his professional services (plats, maps, specifications, etc.) to the land so that they can be incorporated into the improvement. To

hold otherwise would be to create an unprincipled distinction between classes of lien claimants that is not reflected anywhere within the statute.

Given that the "commenced to be furnished" language of the statute should be given the same meaning for those providing materials and those providing professional services, this Court should reject Stanley's argument that any work done anywhere by a professional sets the priority date of a professional services lien.

4. Stanley's proposed interpretation of the statute renders the word "furnished" a nullity.

Stanley's interpretation of section 45-506 should be rejected because it eliminates the word "furnished" from the statute. It is a well settled tenant of statutory construction that "when interpreting a statute, every effort should be made to give meaning to each word so as not to render any word superfluous or without meaning." *Barringer v. State*, 111 Idaho 794, 803, 727 P.2d 1222, 1231 (1986) (citing *University of Utah Hospital and Medical Center v. Bethke*, 101 Idaho 245, 611 P.2d 1030 (1980)). In its argument that a professional services lien has priority from the first date any professional services were performed anywhere, Stanley focuses intently on the word "commenced..." and studiously avoids any analysis of the phrase "...to be furnished." *See, e.g.* App. Br. 22 ("Put simply, the engineer's lien is preferred and prior to any mortgage that attached subsequent to the time the professional services were commenced."). Stanley's proposed interpretation improperly equates the doing of any professional services with the furnishing of professional services and effectively writes the word "furnished" out of the statute. Because a statute cannot be read so as to render any words superfluous or without meaning, Stanley's interpretation must be rejected.

As demonstrated above, Idaho Code § 45-501 creates a distinction between the acts of making ready, preparing, or doing and the act of furnishing. Section 45-501 gives lien rights

only when professional services are "furnished" and section 45-506 provides that the priority date for a professional lien is the date the "professional services were commenced to be furnished." *Beall Pipe* has interpreted "commenced to be furnished" to require delivery of the materials to the land. The interpretation advanced by Stanley must be rejected because it requires this Court eliminate the word "furnished" from the statute. Based on the foregoing, this Court should hold that the phrase "commenced to be furnished" requires a professional services lien claimant to show the first date professional services were furnished or delivered to the land.

B. Off site, pre-construction "project administration" is not "furnishing" of professional services.

Given the facts of this case, this Court need not decide exactly what it means to "commence to furnish" professional services in every situation because, whatever it might include for a given project, it must include something more than 1.5 hours of off-site, pre-construction "project administration." Stanley cites *Contractor's Equip. Supp. Co. v. Prizm Group & Construction*, 2011 WL 6002462, *1 (D. Idaho, Nov. 30, 2011) and *Memorandum Decision and Order Re: Credit Suisse AG, Cayman Islands Branch's Motion to Reconsider* for the proposition that "commenced to be furnished" does not require visible construction on the property. Neither of these cases is instructive to the case at bar because neither case details the type of work that the respective courts relied on to satisfy the "commenced to be furnished" requirement of section 45-506. *See Contractor's Equip.* at *1 (noting only that "[lien claimant] began **providing** professional engineering services for the property") (emphasis added) and *Credit Suisse* at 10 ("The Court will adhere to its earlier ruling that the architect's lien has priority from the date architectural services were first **provided**.") (emphasis added).

While the district court's order suggests visible construction must occur, this Court need not draw the line in the same place in order to uphold the district court's decision. Rather, this

Court need only recognize that the date "professional services were commenced to be furnished" means something more than the date "professional services were commenced." Because the record contains no evidence that Stanley "commenced to furnish" professional services, as that phrase is used within the statute, this Court can and should affirm the district court's decision.

IV. CONCLUSION

Idaho Code § 45-506 establishes that a professional services lien has priority from the date professional services are "commenced to be furnished," not the date professional services are commenced. Stanley's evidence and argument improperly equate commencing to **do** professional service with commencing to **furnish** professional services. Because the undisputed evidence in this case proves that Stanley did not "commence to furnish" professional services prior to the date IFA recorded its deed of trust, the district court's decision that IFA's deed of trust is prior to Stanley's lien claims was correct and must be affirmed.

DATED this 10th day of December, 2013.

FISHER RAINEY HUDSON

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on December 10, 2013, a true and correct copy of **RESPONDENT'S BRIEF** was served upon the following by the method indicated below:

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